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MICHAEL RODAK, JR.,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No. 72-1636

UNITED STATES OF AMERICA,
Respondent,

vs.

RICHARD FLOYD McCOY, JR.,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1973

No.....

UNITED STATES OF AMERICA,

Respondent,

vs.

RICHARD FLOYD McCOY, JR.,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A writ of certiorari is respectfully sought to review the opinion of the United States Court of Appeals for the Tenth Circuit, entered in this case on May 7, 1973.

OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not been officially reported. That opinion was made and entered on May 7, 1973, and a copy is appended to this Petition as Appendix A.

The Judgment and Commitment of the United States District Court for the District of Utah — Central Division dated July 11, 1972, sentencing the defendant to imprisonment for a period of 45 years after his conviction by a jury of the crime of "Air Piracy" is appended to this Petition as Appendix B.

JURISDICTION

Jurisdiction is invoked under 28 USCA 1254(1), which statutory provision is believed to confer on this Court jurisdiction to review the opinion below.

QUESTIONS PRESENTED FOR REVIEW

The Court of Appeals held that even though the search warrant used to search the defendant's premises was not in accordance with the requirements of Rule 41(c), Federal Rules of Criminal Procedure, since it failed to contain therein the name of the person whose affidavit was given in support of the search warrant, that such error was harmless since it resulted in no prejudice to the petitioner, McCoy. The Court also held that there was probable cause for issuance of the search warrant and even though the only affidavit in support thereof contained entirely hearsay. Therefore, the questions presented by this Petition are:

1. Considering that the search warrant is defective, did the Court of Appeals apply the correct "harmless error" rule and as set forth in prior decisions of the Supreme Court?

2. Did the Court of Appeals err in finding probable cause from the affidavit where the information furnished was entirely double or triple hearsay?

STATEMENT OF THE CASE

This is a criminal case involving a charge against the petitioner of Aircraft Piracy (violation of Section 1472 (i) (1), Title 49 United States Code). He was indicted and convicted on this charge after jury trial and his conviction was affirmed by the Court of Appeals.

The facts which are material to this petition are as follows: On April 7, 1972, United Airlines Flight #855, a Boeing 727, was hijacked while en route from Denver, Colorado to Los Angeles, California and was diverted to San Francisco, California. Various members of the crew testified that the hijack was carried out by means of various threats and that the hijacker claimed to be armed with a grenade, a gun or guns and plastic explosives.

The hijacker demanded and obtained $500,000.00 at San Francisco. He then directed the aircraft over Nevada and into Utah and then apparently bailed out of the aircraft in the general vicinity of Provo, Utah around 11:15 p.m. on Friday, April 7, 1972.

On Sunday morning, April 9, 1972, at approximately 8:00 a.m. a search warrant was issued by the magistrate for the search of the petitioner's premises in Provo, Utah. The only affidavit given in support of the issuance of this search warrant was by Mr. William J. Geiermann, an FBI agent in Salt Lake City. However, his name was not contained in the search warrant as required by the clear mandate of Rule 41(c), Federal Rules of Criminal Procedure, which in applicable part then required that the search warrant "shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof." Instead of containing the name of Mr. Geiermann, the search warrant erroneously stated that it was based upon the affidavit of Mr. Lote Kinney, Jr., he being an-

other FBI agent in Salt Lake City and the one to whom the warrant was directed for execution. Shortly following the issuance of the warrant, the premises of the defendant were searched and a number of extremely incriminating items of evidence were obtained in this search. These included: a typewriter, two flight suits, a parachute harness and a parachute, a black helmet and a green jump type helmet, a hand grenade with pin removed and, most damning of all, the sum of $500,000.00, less only $30.00, in United States currency and wrapped in bank straps.

As noted, the only affidavit in support of the search warrant was given by Agent Geiermann. He had absolutely no first hand knowledge of anything contained in the affidavit upon which the warrant was based. Moreover, none of the direct informants to Agent Geiermann had any first hand konwledge of anything upon which the warrant was based. The affidavit consisted entirely of double hearsay and in two instances, triple hearsay. Nevertheless, the magistrate concluded that this affidavit constituted probable cause for the issuance of the warrant.

Prior to trial, the petitioner, through his attorneys, filed a Motion to Suppress on the grounds that the warrant was defective on its face for failure to state the name of the affiant and also on the grounds that it was not based on probable cause by reason of being entirely double or triple hearsay. Considerable testimony was elicited at the trial on the Motion to Suppress. From this testimony it appeared that there was no explanation as to why the affiant's name was not contained in the search warrant except that a mistake had apparently been made by the United States Attorney and his staff who were principally instrumental in preparing the affidavit and warrant and further that their error was not discovered by the magistrate. The trial judge acknowledged that since the error was in clear violation of the unambiguous

language of Rule 41(c), that the warrant was therefore defective on its face. However, he ruled that since the substantial rights of the petitioner were not effected thereby, that it was only "harmless error." The Court of Appeals affirmed this ruling and, in addition, held that the hearsay contained in the affidavit did constitute probable cause for the issuance of the search warrant.

REASONS FOR GRANTING WRIT

This Court should review the decision below for the following reasons:

1. The Court of Appeals for the Tenth Circuit has decided a federal question, to-wit: the interpretation of "harmless error" in a search and seizure case, in a way that is in conflict with applicable decisions of this Court.

2. The Court of Appeals for the Tenth Circuit has erroneously found probable cause for the issuance of the warrant in a way that is in conflict with applicable decisions of this court.

POINT I

THE COURT OF APPEALS HAS ERRONEOUSLY APPLIED THE "HARMLESS ERROR" RULE IN THIS CASE.

POINT II

THE SEARCH WARRANT FOR THE DEFENDANT'S PREMISES WAS CLEARLY DEFECTIVE SINCE IT FAILED TO STATE THE NAME OF THE PERSON WHOSE AFFIDAVIT WAS GIVEN IN SUPPORT THEREOF.

Both the trial judge and the Court of Appeals conceded, as they must, that the search warrant used to search the petitioner's premises was defective on its face inasmuch as it did not contain

therein the name of the person whose affidavit was given in support of the search warrant and as positively required by Rule 41(c) of the Federal Rules of Criminal Procedure. These Courts held that even though an error had been made that it was a harmless one and was not a prejudicial error. Petitioner respectfully submits that this ruling constituted error under the applicable decisions of the United States Supreme Court.

So far as counsel for the petitioner has been able to discover, there is no United States Supreme Court case that has squarely upheld the use of the so-called "harmless error" doctrine in a search and seizure case. That is, there has been no case decided by the Court holding that even though the search was invalid that evidence received in evidence and obtained in the search would not serve as a basis for reversible error because the receipt of such evidence was harmless in light of the otherwise overwhelming evidence of guilt. This issue has been raised before the Court in at last two cases, these being: *Fahy v. Connecticut,* 375 U.S. 85, 84 S. Ct. 229, 11 L. Ed. 2d 171 (1963) and *Bumper v. North Carolina,* 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed.2d 797 (1968). However, the Court did not actually decide this question although there is considerable dicta in both opinions that the Court might adopt a "harmless error" rule in a search and seizure case and under the proper facts.

While the Court has not definitely decided the question of whether or not the harmless error rule can be applied in search and seizure cases, it did, in the *Fahy* case, enunciate the standard which must be followed whenever the harmless error doctrine is applied. In the words of the Court:

> We are not concerned here with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. *The*

> *question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.* [Emphasis added] *Id.* at 375 U.S. 85, 86.

After the *Fahy* decision, the Court further clarified the standard which must be followed in applying the harmless error doctrine to any particular case. In *Chapman v. State of California*, 386 U.S. 18, 24, 87 S. Ct. 824, 828, 17 L. Ed. 705 (1967), the Court recognized the Fahy standard and then further added:

> before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless *beyond a reasonable doubt.* [Emphasis added] *Id.* at 17 L. Ed. 710, 711.

In its opinion of May 7, 1973, affirming the conviction in this case, the Court of Appeals failed to apply the standards referred to above. In substance, the Court of Appeals ruled that even though error was committed and Rule 41 was not followed, that no substantial right of the petitioner was violated. This is not the test. The Court of Appeals' opinion completely disregarded whether it could be said beyond a reasonable doubt that the erroneously admitted evidence contributed to the petitioner's conviction. That is the test that was enunciated by the *Fahy* and *Chapman* cases, and it was ignored by the Court of Appeals.

Even the most cursory review of the trial transcript would demonstrate that the admission of the evidence in question was not "harmless error" under the standard enunciated by the Court. To the contrary, the evidence obtained and later admitted into court based on this defective search warrant was of the most harmful and incriminating kind insofar as it related to the conviction of this petitioner. This included a hand grenade with pin pulled (the presence of which on the hijacker had been testified to by some of the flight crew), parachutes and other paraphernalia

that closely resembled items used by the hijacker and testified to by the flight crew and, most incriminating of all, the very sum of money, less $30.00, obtained by the hijacker. In fact, most of this currency was identified by serial numbers as being the same bills loaded on the hijacked aircraft at San Francisco. Needless to say, there was no possible way to explain away this kind of evidence and it would be naive to say that it did not contribute to the petitioner's conviction. Moreover it could be said not only as "a reasonable possibility", but as a certainty that the prosecution did not regard the evidence in question as being "harmless". This is evident from the zeal with which they pursued its admission at the trial. The "harmless error" rule is a worthwhile one to apply in search and seizure cases where erroneously obtained evidence is admitted by mistake, is merely cumulative, or something to that effect, but it is hardly applicable to evidence of the magnitude of that obtained in the search of this petitioner's premises.

POINT III

SINCE THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT CONTAINED ONLY DOUBLE OR TRIPLE HEARSAY, IT DID NOT PROVIDE PROBABLE CAUSE FOR THE ISSUANCE OF THE WARRANT.

Agent Geiermann gave the only affidavit in support of the search warrant. He had no personal knowledge as to what had occurred and none of the persons furnishing information to him had any personal knowledge as to what had occurred. Of the six categories of information contained in the affidavit, in the case of two of them, there was even triple hearsay involved. In the case of the other information upon which the warrant was based, it was all double hearsay.

Petitioner is well aware that a search warrant may be based on hearsay to some extent. *United States v. Harris,* 403 U.S. 573 (1971) and *Jones v. United States,* 362 U.S. 257 (1960). He is also aware of the Eighth Circuit cases *United States v. Kleve,* 465 F.2d 187 (8th Cir. 1972) and *United States v. Smith,* 462 F.2d 456 (8th Cir. 1972). However, petitioner respectfully submits that this has not been the ruling of the court and as primarily based on *Ventresca v. United States,* 324 F.2d 864 (1st Cir. 1963) reversed on other grounds 380 U.S. 102, 12 L. Ed.2d 684, 85 S. Ct. 741 (1965). In the *Ventresca* case, the Court of Appeals, in effect, ruled that an affidavit grounded on double hearsay alone was not sufficiently credited to support a finding of probable cause. It is true that the Court in the *Ventresca* case reversed the Court of Appeals, but not on that grounds. The Court did disagree with the Court of Appeals construction of the affidavit itself but in its opinion, the Court tacitly agreed with the Court of Appeals that if the affidavit was hearsay on hearsay that this would not be sufficient.

The case of *United States v. Morin,* (Conn) 250 F. Supp. 507 (1966) also involved a motion to suppress evidence. That Court referred to the *Ventresca* decision and noted that the Supreme Court had disagreed with the Court of Appeals in its construction of the affidavit, but the Connecticut District Court then went on to say:

> But in deciding that the Court of Appeals was wrong about this point, there was certainly tacit agreement with the fundament that probable cause for a search warrant cannot be based on information which is 'hearsay on hearsay or some other form of multiple hearsay.' See *Ventresca,* Douglas J., dissenting. The justices were not divided on that.

The Court should not extend the rule of the *Jones* case and should require that at least some of the information furnished directly to the affiant be based on personal knowledge and be something strongly than double or triple hearsay.

CONCLUSION

Petitioner respectfully urges the Court to grant certiorari for the reasons stated above.

Respectfully submitted,

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APPENDIX A

Filed in United States Court of Appeals
Tenth Circuit
May 7, 1973
Howard K. Phillips
Clerk

UNITED STATES COURT OF APPEALS TENTH CIRCUIT

MARCH TERM — 1973

No. 72-1646

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RICHARD FLOYD McCOY, JR.
Defendant-Appellant.

Appeal from the United States District Court
For the District of Utah, Central Division
(D.C. No. CR-33-72)

James M. Dunn, Assistant United States Attorney (C. Nelson Day, United States Attorney, on the brief), for Plaintiff-Appellee.

David K. Winder, for Defendant-Appellant.

Before SETH, McWILLIAMS and BARRETT, Circuit Judges

McWILLIAMS, Circuit Judge.

Richard Floyd McCoy, Jr., was convicted by a jury of aircraft piracy under 49 U.S.C. § 1472(i) (1) and he now appeals his sentence of forty-five years. The only point raised on appeal concerns the validity of a search warrant which purported to authorize a search of McCoy's home. In view of the narrow issue presented to us for review, background facts need not be developed in detail.

A United Airlines plane en route from Denver, Colorado, to Los Angeles, California, was taken over by a so-called sky-jacker who by virtue of threats caused the pilot to change his course and land in San Francisco, California. There, the passengers were permitted to deplane and, pursuant to further direction of the sky-jacker, $500,000 in currency and several parachutes were brought aboard the plane. Still acting under threats from the sky-jacker, the pilot then flew the plane back to Utah, with the sky-jacker apparently bailing out near Provo, Utah, taking the $500,000 with him.

Two days after the sky-jacking, McCoy was arrested at his home in Provo, Utah. McCoy was immediately taken before a magistrate who advised him of his various constitutional rights. At the same time and place an FBI agent named William J. Geiermann presented his affidavit to the magistrate and asked for the issuance of a warrant to search McCoy's residence. The magistrate determined that probable cause was shown by Geiermann's affidavit, and issued a search warrant. However, the warrant signed by the magistrate, through someone's error or oversight, mistakenly identified the affiant as one Lote Kinney, Jr., also an FBI agent, instead of Geiermann. As indicated, Geiermann was the only one who had presented an affidavit to the magistrate in support of the request for a search warrant. The warrant itself was directed to Kinney, and he and others operat-

ing under his direction conducted the ensuing search of McCoy's residence. The search disclosed, among other things, $499,970 in currency, parachute and harness, grenade, gun and ammunition, and the like.

Four days prior to trial, counsel for McCoy filed a motion to suppress the various articles taken in the search of McCoy's home, alleging that the affidavit did not show "probable cause" for the issuance of a search warrant and that the search warrant itself was "insufficient on its face."

The motion to suppress came on for hearing at the commencement of the trial proper. At the conclusion of the relatively short hearing, the trial court stated that it would defer its ruling till the matter came up during the course of the trial. In the course of the trial, then, the circumstances surrounding the issuance of the search warrant were fully explored, initially out of the presence of the jury, and the trial court then denied the motion to suppress. Accordingly, the articles seized in McCoy's home by the FBI agents were received into evidence. As indicated, the only matter urged in this court concerns the propriety of the trial court's denial of McCoy's motion to suppress.

I

As indicated, the affidavit upon which the issuance of the search warrant was based was that of agent Geiermann. McCoy's complaint about the sufficiency of the affidavit relates to the fact that the statements contained therein were all based on information acquired by Geiermann from others. In other words, Geiermann himself had no so-called firsthand information, and his statements were all based on what he had been told by other FBI agents who in turn had themselves acquired their information from others. The affidavit, then, according to counsel, is one

based on double hearsay, if not indeed triple hearsay, and for that reason alone was insufficient to permit a finding by the magistrate that probable cause did exist for the issuance of the search warrant. Let us examine the affidavit a bit more closely.

In his affidavit, Geiermann stated that he had been advised by a fellow FBI agent from San Francisco that a passenger aboard the hijacked plane had been interviewed and that this passenger had viewed a number of photographs presented to him by the FBI and had identified a picture of McCoy as being a picture of the sky-jacker.

Geiermann in his affidavit also stated that he had been advised by a fellow FBI agent who had interviewed a stewardess aboard the sky-jacked plane that he had received from the stewardess a hand printed note which the sky-jacker had sent the pilot during the flight, and that he had been since advised by a document examiner at the FBI laboratory in Washington, D.C., that the writing on the hand printed note had been identified as being the handwriting of McCoy as contained in his official Army personnel records.

Also, in his affidavit, Geiermann stated that he had been advised by still another fellow FBI agent who had talked with a Utah state highway patrolman who served in the Air National Guard with McCoy and that the patrolman had informed him that McCoy was a sky-diver and that the two of them had discussion regarding a plane sky-jacking and that he had ascertained that on the night of the sky-jacking McCoy was not at home.

Without going into more detail, the foregoing is indicative of the type of information set forth in Geiermann's affidavit, which consisted of some six typewritten pages. It is correct to say that all of Geiermann's statements were based on information

relayed to him by fellow FBI agents who had in turn acquired their information from others interviewed in the course of their particular investigative endeavors. In this regard *see* United States v. Ventresca, 380 U.S. 102 (1965), where it was held at page 111 that observations of a fellow Government officer engaged in a common investigation may form the basis for a warrant applied for by one of their number. So then, it is quite true that the affidavit contained some double hearsay, and perhaps even a bit of triple hearsay. However, such fact in and of itself does not render the affidavit insufficient. In determining the sufficiency of an affidavit, the test is whether the affidavit sets forth sufficient underlying facts and circumstances to the end that the magistrate can make a detached judgment as to the reliability of the various sources of the affiant's information. The affidavit in the instant case easily measures up to that test.

That an affidavit for a search warrant may be based on hearsay is well established. United States v. Harris, 403 U.S. 573 (1971), and Jones v. United States, 362 U.S. 257 (1960). Indeed, such is usually the case. As concerns so-called double hearsay, the Eighth Circuit has held that when a magistrate receives an affidavit which concerns hearsay on hearsay, he need not summarily reject this double hearsay information, but is rather called on to evaluate such information as well as all other information in the affidavit in order to determine whether the informant gathered his information in a reliable way and from reliable sources. United States v. Kleve, 465 F.2d 137 (8th Cir. 1972), and United States v. Smith, 462 F.2d 456 (8th Cir. 1972). We subscribe to the reasoning of those cases.

In evaluating the affidavit of Geiermann, it should be noted that we are not here concerned with professional informers, identified or unidentified. Rather, we are concerned with information

acquired by FBI agents from named persons who were either eye witnesses to the crime or had information acquired from McCoy himself. This we deem to be of considerable significance in connection with the magistrate's determination as to the reliability of the affiant's sources of information. In this connection it was held in United States v. Bell, 457 F.2d 1231 (5th Cir. 1972), that a supporting affidavit in an application for a search warrant must attest to the credibility of an informer and his information, but that such requirement did not extend to information acquired from an eye witness to a crime.

Without belaboring what we deem to be quite obvious, the affidavit of Geiermann in the instant case was amply sufficient to permit the magistrate to exercise his independent judgment as to the reliability of the various sources of information. Indeed, on the basis of the affidavit before him, the magistrate could only have concluded that probable cause did exist for the issuance of a search warrant.

II

Through the error or oversight on the part of some person or persons, the search warrant, as issued, named therein the affiant as Lote Kinney, Jr., instead of William J. Geiermann. Counsel asserts that this error renders invalid the warrant and the search based thereon. We disagree, as under the facts of this case we see no resulting prejudice to McCoy.

The Fourth Amendment requires that no search warrant shall issue except on probable cause, supported by oath or affirmation, but does not require that the name of the affiant be set forth in the warrant itself. So, we are not here concerned with any

constitutional mandate. However, Fed. R. Crim. P. 41(c), before the recent amendment thereof, did direct that the warrant shall state the "names of the persons whose affidavits have been taken in support thereof." That particular requirement has since been deleted from the rule, the official committee notes to the amendment stating that the requirement that the warrant itself should state the names of the affiant was being eliminated as "unnecessary paper work." However, such requirement was in effect when the search warrant was issued in the instant case. Fed. R. Crim. P. 52 directs a trial court to disregard any error, defect, irregularity or variance which does affect a defendant's substantial rights. And under 28 U.S.C. § 2111 an appellate court is directed to "give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties." For reasons set forth below we do not believe the misidentification in the warrant of the affiant in anywise prejudiced McCoy.

The reason for the earlier requirement in the rule that the warrant name the affiant is said to be that someone must take responsibility for the facts which purportedly give rise to the probable cause for the issuance of the search warrant, and that the defendant should be apprised of the name of that person. Additionally, it has also been stated that another reason for naming the affiant in the warrant is to enable the aggrieved person to probe and challenge the legality of the warrant by challenging, in court, the affiant and his statements. United States ex rel. Pugh v. Pate, 401 F.2d 6 (7th Cir. 1968), *cert denied*, 394 U.S. 999 (1969), and King v. United States, 282 F.2d 398 (4th Cir. 1960). However, as we see it, McCoy was not prejudiced in either of those areas by the fact that Kinney, rather than Geiermann, was named in the warrant as the affiant.

Although we do not attribute great significance to it, the fact is that McCoy was present in the magistrate's office at the very moment Geiermann presented his affidavit to the magistrate. This no doubt was just a coincidence. However, we are advised that a copy of the warrant, with Geiermann's affidavit attached thereto, was presented to McCoy's wife when the search was made of McCoy's home. Thereafter, copies of the affidavit and the search warrant were on file in the magistrate's office until the return thereon was made, at which time all papers were filed in the office of the clerk of the District Court.

Counsel for McCoy at an early time apparently had access to the affidavit, the warrant and return. At least we know that in explaining why they had delayed filing their motion to suppress till only a few days before trial, counsel candidly stated that it was not till then that they had themselves noted that the warrant named Kinney, rather than Geiermann, as the affiant.

Finally, out of the presence of the jury, there was an in depth inquiry of both Geiermann and Kinney, as well as others concerning the statements in the affidavit, and all the facts and circumstances concerning the issuance of the warrant were fully developed. It is this combination of facts and circumstances that leads us to conclude that McCoy was in fact nowise prejudiced by the misnomer in the warrant.

McCoy relies in this regard on Pugh v. Pate, *supra,* and King v. United States, *supra.* We do not regard those cases as having great applicability to the instant case. Each concerned an affiant who used a fictitious name and thereafter apparently disappeared. At least, in *King,* for example, which incidentally was cited and relied on heavily in *Pugh,* at the hearing on the defendant's motion to suppress the affiant was among the absent and

could not be subjected to examination. It was in this setting that the court in *King* held that the trial court erred in denying the motion to dismiss. Such is a far cry from the instant case. Nor are we persuaded by United States v. Carignan, 286 F.Supp. 284 (D. Mass. 1967), even though the facts there are more akin to the facts of the present case. We are more impressed with the reasoning in United States v. Averell, 296 F.Supp. 1004 (E.D. New York, 1969), which distinguished *Carignan* and held that the failure to designate the affiant in the search warrant was not fatal where no prejudice was shown.

In short, it would seem clear that under the facts and circumstances disclosed by the record before us, the error here complained of is indeed one that did not affect any substantial right and should accordingly be disregarded.

Judgment affirmed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

No. CR-33-72

UNITED STATES OF AMERICA

v.

RICHARD FLOYD McCOY, JR.

On this 10th day of July, 1972 came the attorney for the government and the defendant appeared in person and by counsel, David K. Winder.

IT IS ADJUDGED that the defendant upon his plea of NOT GUILTY and a verdict of GUILTY has been convicted of the offense of violating Section 1472(i), Title 49, United States Code (Air Piracy) as charged and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of FORTY-FIVE (45) YEARS.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Willis W. Ritter
United States District Judge

The Court recommends commitment to: WILLIS W. RITTER, Chief

/s/ Andrew John Brennan
Clerk

A True Copy. Certified this 11th day of July, 1972

/s/ Andrew John Brennan
Clerk.

(By) /s/ Hana Shirata
Deputy Clerk.

MAILING CERTIFICATE

I hereby certify that on the 1st day of June, 1973 that I placed in the mail 40 copies of the foregoing Petition addressed to Clerk of United States Supreme Court, Washington, D.C., two copies of said Petition addressed to Mr. James M. Dunn, Esq., Assistant United States Attorney, 200 Post Office Building, 350 South Main Street, Salt Lake City, Utah 84101 and two copies to Mr. Richard Floyd McCoy, Jr., Petitioner, United States Penitentiary, Lewisburg, Pennsylvania 19837, all of said Petitions being mailed postage prepaid.

.....

DAVID K. WINDER

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-1636

RICHARD FLOYD MCCOY, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 1973. The petition for a writ of certiorari was filed on June 6, 1973. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an affidavit submitted to support the issuance of a search warrant was insufficient because it consisted of an FBI agent's compilation of reports made to him by other FBI agents conducting an investigation into the offense charged.

2. Whether the search was invalid because the warrant incorrectly stated the name of the affiant.

STATEMENT

After a jury trial in the United States District Court for the District of Utah, petitioner was convicted of aircraft piracy, in violation of 49 U.S.C. 1472(i)(1), and sentenced to imprisonment for forty-five years. The court of appeals affirmed (Pet. App. A).

The pertinent facts, summarized in the opinion of the court of appeals, show that on April 7, 1972, a United Airlines plane en route from Denver to Los Angeles was commandeered by a skyjacker who forced the pilot to alter his course and land in San Francisco. There the skyjacker allowed the passengers to deplane and received a ransom of $500,000 and several parachutes from the airline company. The pilot was then ordered to fly to Utah. The skyjacker bailed out with the money near Provo, Utah.

Two days later, petitioner, a resident of Provo, Utah, was arrested and immediately taken before a magistrate. In petitioner's presence, FBI agent William J. Geiermann submitted an affidavit to the magistrate, who then issued a warrant to search petitioner's residence. As a result of that search, $499,970 in currency and other incriminating items such as weapons, ammunition and a parachute and harness were seized from the residence.

ARGUMENT

1. The lengthy affidavit supporting the search warrant contained information collected by agent Geiermann from other FBI agents who had reported the results of their own investigations. For example, agent Geiermann stated that he had been advised by a San

Francisco agent that a passenger aboard the hijacked plane had been interviewed and had identified a photograph of petitioner as being a picture of the skyjacker. Geiermann also reported in his affidavit that he had been informed by another agent that the latter had interviewed one of the plane's stewardesses; that she had produced a note which the skyjacker had sent to the pilot during the flight; and that the writing on the note had been examined at the FBI laboratory in Washington, D.C., and found to match petitioner's handwriting on his military records. Agent Geiermann stated further that he had been advised by another FBI agent that a Utah state policeman serving in the National Guard with petitioner had said that petitioner was a sky-diver; moreover, the patrolman had talked with petitioner about a plane skyjacking and had determined that petitioner was not home on the night the offense in question had been committed. The patrolman also stated that he had been told by petitioner's sister-in-law that petitioner had asked for help in a hijack operation.

While recognizing that search warrants may properly be based on hearsay (*e.g., United States* v. *Harris,* 403 U.S. 573; *Jones* v. *United States,* 362 U.S. 257), petitioner claims that affidavits based upon "double hearsay"—*i.e.,* hearsay statements of individuals containing statements made to them—are inadequate to support a finding of probable cause. This position is not well taken. No hearsay need be automatically disqualified; rather, it can be evaluated to determine whether the informant obtained his information in a reliable way and from reliable sources. If so, the requisite amount and quality of information might well exist to justify issuance of a warrant. *United States* v. *Smith,* 462 F. 2d 456 (C.A. 8).

This case does not involve unnamed informants of questionable reputation providing anonymous hearsay upon hearsay. See *United States* v. *Roth*, 391 F. 2d 507 (C.A. 7); cf. *United States* v. *Moore*, 452 F. 2d 569 (C.A. 6), certiorari denied, 407 U.S. 910. Rather, the affidavit under attack was the product of investigations conducted in different communities by several FBI agents, who had secured their information from eyewitnesses, scientific reports, and individuals who had spoken directly with petitioner. All of these interviews and reports were collected by agent Geiermann, who justifiably relied upon them in preparing his affidavit. As the Court of Appeals for the Fifth Circuit recently held (*United States* v. *Melancon*, 462 F. 2d 82, 91, certiorari denied, 409 U.S. 1038):

> We see no reason to discredit information passed from one law enforcement official to another before being offered to a magistrate as grounds for probable cause.

2. Through an oversight, the warrant issued by the magistrate incorrectly identified as the affiant another FBI agent, Lote Kinney, Jr., who was directed to execute the warrant. The court of appeals correctly analyzed this technical error as not affecting petitioner's constitutional rights, since the Fourth Amendment does not require that the name of the affiant be identified in a search warrant. At the time the warrant was issued, however, Rule 41(c), Fed.R.Crim.P., did direct that a warrant should state the names of the affiants.[1] Nevertheless, in light of the facts (1) that

[1] Effective October 1, 1972, the provision requiring the listing of affiants in a warrant was deleted. The Advisory Committee on Rules explains (Notes of Advisory Committee on Rules, 18 U.S.C. (Supp. II), Rule 41, p. 404):

> The requirement that the warrant itself state the grounds for its issuance and the names of any affiants, is eliminated

petitioner was well aware of the identity of the affiant, since he was present when agent Geiermann submitted his affidavit, (2) that a copy of the affidavit was properly presented to petitioner's wife when the warrant was executed, and (3) that the oversight had no effect upon petitioner's ability to challenge the matter contained in the affidavit, the courts below properly denied relief to petitioner based upon this irregularity. They correctly concluded that petitioner's Fourth Amendment rights were totally unaffected by what amounted to nothing more than "technical noncompliance with a paperwork requirement." *United States* v. *Soriano,* decided July 2, 1973 (C.A. 5, No. 72-1520, slip op., p. 21).

Petitioner claims, however, that the test for applying the harmless error rule in the law of search and seizure is whether the admission in evidence of the product of an unlawful search was harmless in light of otherwise overwhelming evidence of guilt (Pet. 6). He alleges that under this test the courts below were required to determine whether the items recovered from his residence had a significant impact upon the jury's verdict. The standard urged by petitioner may well be applicable in instances where a search itself is invalidated under the Fourth Amendment. Here, however, the issue is whether the validity of the search of petitioner's residence under the Fourth Amendment was affected by the technical defect in the warrant. Where the matter complained of involves merely a procedural irregularity in observing the requirements of Rule 41, "absent a showing of prejudice, irregularities in these

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as unnecessary paper work. * * * A person who wishes to challenge the validity of a search warrant has access to the affidavits upon which the warrant was issued.

procedures do not void an otherwise valid search." *United States* v. *McKenzie*, 446 F. 2d 949, 954 (C.A. 6).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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